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SUPERIOR COURT OF STATE OF ARIZONA
COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

vs.

JAMES ARTHUR RAY,

Defendant.

CASE NO. V1300CR201080049

Hon. Warren Darrow

DIVISION PTB

DEFENDANT JAMES ARTHUR RAY'S MOTION TO EXCLUDE STATE'S 107 AUDIO CLIPS FROM SPIRITUAL WARRIOR RETREAT

Defendant James Arthur Ray, by and through undersigned counsel, hereby moves this Court to exclude the 107 audio clips that the State has created from the 5-day Spiritual Warrior retreat. This motion is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The State of Arizona, through the Yavapai County Attorney, asks this Court to create a new body of law and countenance criminal liability for which there is literally no legal precedent. The State's new theory of the crime is that Liz Neuman, James Shore, and Kirby Brown died because Mr. Ray's teachings persuaded them to "play full on." According to the State, these and other words from Mr. Ray induced the decedents to stay inside the sweat lodge to the point of death, in spite of the extreme physical suffering they may have experienced.

This theory of the case runs headlong into the First Amendment. Subject to narrow exceptions that do not apply here, the First Amendment forbids a State from prosecuting a man because of the purported effect his speech has on others. The State's theory does not lie at the margins of First Amendment protection, but rather at its core content. And the State's theory renders this prosecution so devoid of notice, and renders Arizona's recklessness statute so vague, that it violates the Due Process Clause as well. Even assuming that the evidence supports the State's claim that participants were conditioned to risk and then suffer death—and it plainly does not—this Court cannot disregard well-defined and binding rules from the United States Supreme Court that govern when a State can prosecute someone for their speech. To do so would be plain error.

The State's First Amendment defect mars the entirety of its prosecution. For present purposes, it is clear that the Court must exclude the audio clips and all other evidence that the State has culled in support of its speech-based theory.

II. STATEMENT OF FACTS

The State's initial position was that the *entire* recording of the five-day Spiritual Warrior seminar was relevant to the case, leaving the Defense to guess at what arguments the State might make for the relevance of whatever edited clips the State choose. Then, in the State's Response to the Defendant's Motion to Exclude the audio recordings, the State articulated its theory that the entire audio recording is relevant because it allows the jury to hear the manner in which Mr. Ray's speech "conditioned" participants "all week long" to "play full on, to act like Samurai

warriors, to live honorably and to surrender to death." State's Response to Motion to Exclude Audio Recordings of Spiritual Warrior Seminar Events, filed 2/25/11, at 8. The Defense objected to this position on First Amendment and Due Process grounds. *See* Defendant's Reply In Support of Motion to Exclude Audio Recordings, filed 2/28/11, at 1. The Court then issued an "initial" ruling, stating that "[f]rom the excerpts referred to in the State's response, it is apparent that some of the information on the recording could be relevant to the Defendant's mental state," but adding that "[t]he Court qualifies this ruling as being an 'initial' ruling in recognition of the fact that pretrial evidentiary rulings may be limited or revised based on the evidence presented at trial." Ruling on Motion to Exclude Audio Recordings, 2/28/11, at 1.

After trial began, the State informed the Defense of its intent to play individual clips of the seminar. As the Court is now aware, the State produced to the Defense a CD containing 107 audio clips that the State selectively created from the recording of the five-day Spiritual Warrior retreat. The CD of clips is attached as Exhibit A for the Court's review. The State's practice thus far has been to notify the Defense, sometimes the morning of when a witness is to testify and sometimes 1–3 days in advance, which clips the State intends to play for each witness, with no proffer of relevance. The Defense then reviews the clips during a break or overnight and arrives the following morning to argue its objections, delaying proceedings for the Court and jury. In addition, the State has now taken the position that the Defense must identify the ways in which any particular clip is deficient under Rule 106, and that the Defense must then prepare and burn an alternative audio CD for the State to use in its case. *See* Email from Sheila Polk, dated 3/14/11, attached as Exhibit B.

The Defense has repeatedly raised its objections but, because of the lack of timely notice, has only been able to challenge the State's efforts on an *ad hoc* basis. With due respect, this is not a workable arrangement. Nor is this a procedure designed in any way to protect Mr. Ray's constitutional rights—indeed, it appears designed to guarantee a mistrial. This issue is now ripe for, and indeed demands, this Court's comprehensive review.

III. ARGUMENT

A. The State's Intended Use of the 107 Audio Clips Is Barred by the First Amendment[1]

The State's attempt to punish Mr. Ray for the effect that his speech allegedly had on the decedents is barred by the First Amendment. "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002) (internal quotation marks omitted). A law targeting speech based on its content is "'presumptively invalid,' and the Government bears the burden to rebut that presumption." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 817 (2000) (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992)). When the State seeks to impose criminal liability on a defendant based on the content of his speech, therefore, it bears the burden of establishing that the speech is unprotected. The State has made no effort to meet its burden here, and it cannot do so.

1. The State seeks to punish Mr. Ray for the content of his speech and its alleged effect on listeners.

The State's new theory is that Mr. Ray's words compelled the decedents to behave in a certain fashion in the sweat lodge. Despite the fact that government witness after government witness has so far rejected the State's legally novel and factually unsupported theory, there is no mistaking that the criminal conduct the State alleges is *Mr. Ray's speech*. As the State attempts to explain:

- "Defendant told his participants on the first day to prepare for the ultimate battle, to live an honorable life, to devote themselves 100% to everything they do, or exit dishonorably." State's Response to Motion to Exclude Audio Recording of Spiritual Warrior Seminar Events, filed 2/25/11, at 2.

[1] In a separate motion filed on this day to exclude inadmissible evidence, Mr. Ray points out the flaws of logic and relevance that independently bar admission of the audio clips.

- "Defendant exhorted everyone to participate in the events of the week 100 % in order to get the full value of their 'investment.' Defendant called this 'playing full on' and promised the group they would leave different people." *Id.*
- The audio recordings are necessary to "enable the jury to understand the extent of Defendant's persuasion on the victims and witnesses." *Id.*.
- "In order to understand how Defendant recklessly caused three deaths, it is imperative to understand the Defendant's conditioning and grooming of the participants all week long to trust him and follow him." *Id.* at 8.
- "In order to understand the mental state of the victims, it is necessary to hear how Defendant conditioned them all week long play full on, to act like Samurai warriors, to live honorably and to surrender to death." *Id.*
- Participants "were reminded time and again by Mr. Ray to play full-on," and witnesses "will testify that by the end of the week when they entered Mr. Ray's sweat lodge for the grand finale event, his heat endurance challenge, they were exhausted, mentally weak, and fully conditioned to follow Mr. Ray's instructions." State's Opening Statement at 8.
- "Participants were told to approach . . . the Vision Quest with impeccability. And Mr. Ray reminded them that he had told them when they signed up not to come to Spiritual Warrior if they were not willing to do this work." *Id.*. at 14.
- "And, finally, shortly before leading his followers into the sweat lodge, Mr. Ray tells the participants to bring a determination of steel." *Id.* at 18.
- "Most, if not all participants will testify they remained inside the sweat lodge because they did not want to disappoint Defendant and/or they trusted him." State's Response to MIL No. 9 Re: Rick Ross, at 5.
- "Defendant encouraged the victims to remain in an unsafely hot sweat lodge maintained by defendant, causing their deaths." *Id.* at 7.

- "Defendant used the metaphor of death during his five day-long seminar with constant emphasis, through Defendant's lectures and his planned activities, on conducting themselves as 'honorable warriors.'" *Id.*[2]

In short, the State alleges that Mr. Ray's words of encouragement, and his teachings regarding perseverance and honor, caused the decedents to die—and thus justify criminal prosecution in this case. That the State's words-of-encouragement theory seeks to punish Mr. Ray for the content of his speech should be clear. The State would not have pressed this theory if the content of Mr. Ray's statements had been different; had Mr. Ray encouraged participants to give up and leave the sweat lodge, the State's theory would obviously not apply. It is the *content* of Mr. Ray's speech, and its alleged affect on its listeners, that gives rise to the State's theory of guilt. This is precisely when the First Amendment, in service of values extending beyond the individual criminal case, intercedes.

Indeed, the State's theory affronts the *heartland* of First Amendment protection. Unlike the narrow exceptions to First Amendment protection that involve, for example, intentional incitement to imminent and likely violence, *see Brandenburg v. Ohio*, 394 U.S. 444, 447 (1969), the State here takes issue with Mr. Ray's teachings and urges a particular view about what his expression meant. The State plucks discussions of symbolic death and rebirth, or of playing "full on," or of "living impeccably," and argues to the jury that this speech had a particular (and criminal) meaning and effect. The Defense, of course, has a very different view. But this Court cannot, consistent with the First Amendment, have a criminal trial about the meaning of a man's philosophy. Not only would litigating Mr. Ray's philosophy require putting *all* of Mr. Ray's teachings in context—mindful of the fact that many participants had attended numerous JRI seminars and read Mr. Ray's books—but it would require this Court and the jury to stand in

[2] In advancing its speech-based theory of the crime, the State also now avers that Mr. Ray's criminal conduct is not confined to the Thursday sweat lodge ceremony. *See* State's Response to Motion to Exclude Audio Recordings of Spiritual Warrior Seminar Events, at 10 ("Defendant wants the jury to believe his conduct begins – and ends – within a three-hour period. It does not."). Surely the State is not now seeking prove a 5-day crime. Such an amendment of the charges during trial would violate the Due Process Clause.

judgment of Mr. Ray's beliefs. This country disavowed such a trial when it adopted the First Amendment.

2. The First Amendment forbids prosecutions based on the effect of the speaker's communication upon its hearers.

The State seeks to convict Mr. Ray because, it submits, his words were too persuasive—convincing the decedents, against their better judgment, to remain in the sweat lodge until their deaths. In addition to being false, this logic is repugnant to the First Amendment: "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments.... [I]f there be any danger that the people cannot evaluate the information and arguments advanced by [speakers], it is a danger contemplated by the Framers of the First Amendment." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 791-92 (1978); *see also Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 96-97 (1977) (ruling that a Township Council ordinance "restrict[ing] the free flow of ... data because [the Council] fears that otherwise homeowners' will make decisions inimical to what the Council views as the homeowners self interest" is unconstitutional and "paternalistic"). As one leading First Amendment scholar put it:

> "Persuading and informing people may certainly cause harm; the listeners might be persuaded to do harmful things. But the premise of modern First Amendment law is that the government generally may not (with a few narrow exceptions) punish speech because of a fear, even a justified fear, that people will make the wrong decisions based on that speech."

Eugene Volokh, *Speech as Conduct*, 90 Cornell L. Rev. 1277, 1304 (2005). In short, the First Amendment rule is this: unless a recognized exception to constitutional protection applies, a person cannot be prosecuted because of the effect his speech has on a listener.

There is no exception to this general rule simply because the speech can be (allegedly) traced to physical harm. To the contrary, such speech remains fully protected unless specific showings are made. For example, even where speech explicitly incites listeners to violence, the First Amendment proscribes punishment unless any ensuing violence is (1) intended, (2) imminent, and (3) likely. *Brandenburg v. Ohio*, 394 U.S. 444, 447 (1969) ("[T]he constitutional

guarantees of free speech and free press do no permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is ***directed*** to inciting or producing ***imminent*** lawless action and is ***likely*** to incite or produce such action." (emphasis added)). In *Brandenburg*, the Supreme Court held that Ohio could not convict a Ku Klux Klan member who broadcast a video displaying people with weapons and calling for "revengeance" on behalf of "the white, Caucasian race." *See id.* at 446–47. *See also Terminiello v. Chicago*, 337 U.S. 1, 3 (1949) (reversing conviction where defendant's racist and inflammatory speech taunted a mob of protestors, who then threw stink bombs, broke windows, and assaulted persons attempting to enter the auditorium). The speech by Mr. Ray that the State alleges constituted criminal conduct does not even come close to meeting the *Brandenburg* test. His words (1) were not directed at causing harm, (2) did not create an imminent risk of harm, and (3) did not make harm likely. Mr. Ray encouraged participants to do their best, live life to their fullest, and, in his words, "play full on," and he did so over a span of days leading up to the sweat lodge ceremony. Indeed, during the approximately 36 hours while the participants were on the Vision Quest, Mr. Ray had no contact with them at all. Mr. Ray's speech is protected by the First Amendment.

Nor is there an exception to First Amendment protection of speech merely because the defendant is prosecuted under a criminal law of general applicability that extends also to non-speech crimes. Numerous U.S. Supreme Court precedents demonstrate the point. In *Cohen v. California*, 403 U.S. 15 (1971), for example, the defendant was convicted under a breach-of-the-peace law for wearing a jacket with an offensive message on it. The Court explained that California was not free to convict the defendant on a theory that the offensive message on his jacket was likely "to cause violent reaction." *Id.* at 22. "There may be some persons about with such lawless and violent proclivities," the Court noted, "but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression." *Id.* at 23. Similarly, the Supreme Court has reversed numerous convictions for protected speech under criminal statutes, like "breach of the peace" and "disorderly conduct" laws, that are facially valid. *See, e.g., Hess v. Indiana*, 414 U.S. 105, 107-09 (1973) (per curiam) (defendant's pronouncement

as sheriffs tried to clear out an antiwar rally that "We'll f***ing take the street later" could not be punished where no illegal action was imminent; "at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time"); *Gregory v. City of Chicago*, 394 U.S. 111, 112-13 (1969) (desegregation advocates could not be convicted for breach of the peace based on peaceable marching, even where onlookers became unruly); *Cox v. Louisiana*, 379 U.S. 536, 545-52 (1965) (protesters of segregation could not be prosecuted for assembling and marching); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (same); *Cantwell v. Connecticut*, 310 U.S. 296, 308-09 (1940) (reversing conviction of Jehovah's Witness who played a record attacking Catholicism, causing listeners to be "highly offended" and to want to hit or throw him).

3. This case does not fall into any of the carefully and narrowly drawn First Amendment exceptions.

Although the First Amendment's protection is not absolute, the exceptions to the rule described above are well-established and narrowly drawn. None applies here. The Supreme Court has recognized certain "historic and traditional categories long familiar to the bar" that encompass "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in judgment); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). As mentioned above, one noteworthy exception is for incitement to violence, which requires a showing that the violence is both imminent and likely. *See Brandenburg*, 395 U.S. 444, 447-49 (1969) (per curiam). Additional exceptions include defamation, *Beauharnais v. Illinois*, 343 U.S. 250, 254-55 (1952), and fraud, *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976), among others.[3] Mr. Ray's speech during the Spiritual Warrior retreat do not fall into any of these traditional categories of unprotected speech.

[3] Other categories are obscenity, *Roth v. United States*, 354 U.S. 476, 483 (1957), and child pornography, *New York v. Ferber*, 458 U.S. 747, 764 (1982). And as the U.S. Supreme Court recently reminded, "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection" as well. *United States v. Williams*, 553 U.S. 285, 297 (2008). Indeed, "[m]any long established criminal proscriptions—such as laws against conspiracy, incitement, and solicitation," the Court pointed out,

Furthermore, it would be wholly inappropriate for the Court to recognize a new category of unprotected speech out of a perceived need to capture Mr. Ray's speech here. Setting aside any due process concerns that would stem from such a retrospective and unforeseeable expansion of criminal liability, *cf. Bouie*, 378 U.S. at 352-53 (a judicial decision unforeseeably enlarging the substantive reach of a criminal statute violates due process), the U.S. Supreme Court has recently cautioned against the ad hoc recognition of new categories of unprotected speech. In *United States v. Stevens*, 130 S.Ct. 1577 (2010), the Government argued that depictions of animal cruelty, as a class, are categorically unprotected by the First Amendment. *Id.* at 1584. First noting that such depictions were not among the "well-defined and narrowly limited classes" of historically unprotected speech, *id.* (quoting *Chaplinsky*, 315 U.S. at 571-72) (internal quotation marks omitted), the Court declined the Government's invitation to add them to the list, *id.* at 1586. The Court emphatically rejected the Government's argument that animal cruelty depictions may be constitutionally proscribed, as a class, simply because they have little redeeming value. "The First Amendment itself," the Court explained, "reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it." *Id.* at 1585.

The same principle applies here: Mr. Ray's speech may not be deemed sanctionable on the basis of any evaluation of its social worth. The First Amendment's protections apply, and the State's theory thus fails as a matter of law. Accordingly, this Court must exclude the State's 107 audio clips and any other evidence the State offers in service of a theory that Mr. Ray committed reckless manslaughter by encouraging his seminar participants to do their best.

"criminalize speech ... that is intended to induce or commence illegal activities." *Id.* at 298. This explains Arizona cases upholding against First Amendment challenge criminal convictions for offering narcotics for sale, such as *State v. Padilla*, 169 Ariz. 70 (Ct. App. 1991). It also explains *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949), a case involving a conspiracy in restraint of trade, on which *Padilla* in part relied. *See Williams*, 553 U.S. at 297 (classifying *Giboney* as a case concerning an "[o]ffe[r] to engage in illegal transactions").

B. The State's Intended Use of the 107 Audio Clips Violates the Due Process Clause

For related reasons, the prosecution's theory of the crime, and its intended use of the 107 audio clips, violate not just the First Amendment, but the Due Process Clause as well. No rational citizen is on notice that he could be criminally prosecuted for his motivational teachings. The State's theory would expose to criminal liability not just motivational speakers, but also coaches, parents, personal trainers, pastors, drill sergeants, guidance counselors, and every other citizen who encourages their friends, relatives, congregants, or customers to strive to be their best. This runs directly afoul of the Due Process guarantee that individuals have "fair notice that engaging in the proscribed conduct risks criminal penalties." *State v. Angelo*, 166 Ariz. 24, 28 (App. 1990).

Indeed, the void-for-vagueness doctrine under the Due Process Clause "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 US. 352,357 (1983). Moreover, when a State's criminal law "is capable of reaching expression sheltered by the First Amendment, the [void-for-vagueness] doctrine demands a greater degree of specificity than in other contexts." *Smith v. Goguen*, 415 U.S. 566, 573 (1974). Yet the State here seeks to apply Arizona's manslaughter statute to speech that is not only protected by the First Amendment, but also has never, *in any jurisdiction*, given rise to criminal responsibility. The Due Process Clause, like the First Amendment, thus forbids the State's prosecution of Mr. Ray.

IV. CONCLUSION

The State's theory of Mr. Ray's supposed crime, articulated most recently and fully in its effort to introduce 107 audio clips, is inimical to the Constitution. It hinges the State of Arizona's prosecution of Mr. Ray on a foundation of error and infects the State's entire case. For present purposes, at a bare minimum, the Court must exclude the State's 107 audio clips—and any other evidence offered in service of the State's unconstitutional theory.

DATED: March 14, 2011

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By: _____

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Copy of the foregoing delivered this 14th day of March, 2011, to:

Sheila Polk
Yavapai County Attorney
Prescott, Arizona 86301

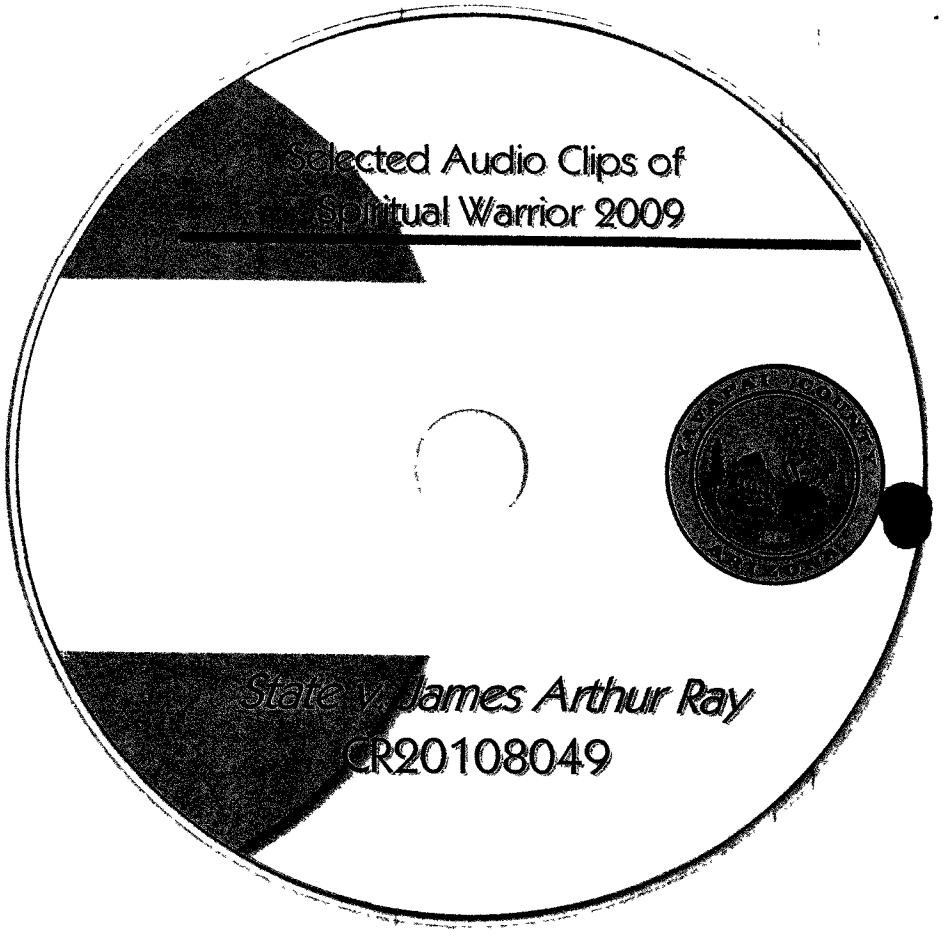
by _____

NON-IMAGEABLE ATTACHMENT PURGED FROM THE FILE

Case # V1300CR201080049

Case Name: JAMES ARTHUR RAY

Description of Item Not Imaged: CD / *Selected Audio Clips Of Spiritual Warrior 2009*


Selected Audio Clips of
Spiritual Warrior 2009
State v. James Arthur Ray
CR20108049

Seifter, Miriam

From: Sheila Polk [Sheila.Polk@co.yavapai.az us]

Sent: Monday, March 14, 2011 8.54 AM

To: Li, Luis; Do, Truc; Seifter, Miriam; Tamra S. Kelly; Tamra S Kelly

Cc: Bill Hughes; Kathy Durrer; Ross Diskin; Penny Cramer

Subject: State v Ray - audio clips and witnesses for the week

Luis,

In addition to the audio clips that have already been admitted, which the State will continue to use in examining witnesses, the State intends to use the audio clips listed below. All of these clips have been previously provided to you in the master audio CD. We will also use additional audio clips in redirect examination as they become relevant through your cross examination. If the State decides to use audio clips in direct examination not listed below, we will notify you in advance.

If you believe additional context should be played for the jury with respect to any of the clips I have identified, please prepare a CD with the additional context and provide it to the State in a timely fashion. I am making this request in order to avoid side bars and jury delays with the State trying to make CDs at the last minute in order to accommodate your requests.

Sunday, October 4, 2009:
04, 05, 09 (James Shore audio, marked as exhibit 754), 10, 13, 15, 16, 17, 18, 23, 25, 29, 36

Monday, October 5, 2009:
10, 13, 14

Tuesday, October 6, 2009:
08, 09, 12, 14

Thursday, October 8, 2009:
08, 30

The State renews its offer to admit into evidence the entire audio recording of the Spiritual Warrior 2009 event.

The witnesses the State intends to call this week are listed below. While we plan to call them in the order below, please be aware that the trial schedule and the needs of the witnesses will dictate the actual order. Please be prepared to examine any of the witnesses on any given day.

Beverly Bunn, Stephen Ray, Sidney Spencer, Linda Andresano, Jeanne Armstrong, Lou Caci, Kim Brinkley, Laurie Gennari, Michael Barber.

Please do not hesitate to contact me if you need anything.

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